

# ARKANSAS SUPREME COURT

No. CR 07-366

JIMMY D. BUMGARDNER, JR.  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered September 18, 2008

APPEAL FROM THE CIRCUIT COURT  
OF GRANT COUNTY, CR 2004-232,  
HON. PHILLIP H. SHIRRON, JUDGE

AFFIRMED.

## PER CURIAM

In 2005, appellant Jimmy D. Bumgardner, Jr., was found guilty by a jury of possession of a controlled substance with intent to deliver, possession of drug paraphernalia and possession of an illegal quantity of pseudoephedrine. He was sentenced as a habitual offender to an aggregate term of 1104 months' imprisonment and fined a total of \$15,000. The Arkansas Court of Appeals affirmed. *Bumgardner v. State*, CACR 05-963 (Ark. App. Jun. 14, 2006). Subsequently, appellant timely filed in the trial court a verified petition pursuant to Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition without a hearing, and appellant has lodged an appeal here from the order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

On appeal, appellant contends that the trial court erred in denying the Rule 37.1 petition by failing to conduct an evidentiary hearing. Also, he contends that the trial court erred in finding that trial counsel was not ineffective for: (1) failing to object to remarks made by the prosecutor; (2) improperly advising appellant to provide information to the jury that was not in the trial record; (3) failing to request the physical presence of appellant during the sentencing hearing; (4) failing to subpoena a witness for a pretrial suppression hearing and not obtaining a continuance in order to secure the witness' presence at the jury trial.

For his first point, appellant complains that he was entitled to an evidentiary hearing on the Rule 37.1 petition. A trial court is not required to hold an evidentiary hearing on a Rule 37.1 petition. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). Pursuant to Rule 37.3(a), a court has discretion to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Id.* In accordance with this rule, a trial court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. *Id.* Here, the trial court's order denying appellant's Rule 37.1 petition is sufficient to indicate that the court made its findings from the record and that the record supported its decision to deny appellant's petition.

As the second point on appeal, appellant contends that trial counsel was ineffective in four instances. Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, that appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). The burden

is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

Appellant's first sub-point regarding ineffective assistance concerns trial counsel's alleged failure to object to remarks made by the prosecutor during closing arguments. Initially, we note that in the original petition filed in the trial court, appellant contended in part that counsel failed to object to "the prosecutor's improper assertions of personal observations regarding evidence." In its order, the trial court did not rule on this issue. We cannot consider this argument on appeal as the failure to obtain a ruling on an issue at the circuit court level precludes review on appeal. *Jackson v. State*, 334 Ark. 406, 976 S.W.2d 370 (1998). Appellant was obligated to properly preserve this issue for review but failed to do so.<sup>1</sup>

We note also that appellant makes several new arguments on appeal regarding other statements made by the prosecutor during the closing and rebuttal closing arguments. These statements were not addressed in appellant's original Rule 37.1 petition. On appeal, we do not consider matters outside the scope of the verified petition filed in the trial court, *Morgan v. State*, 296 Ark. 370, 757 S.W.2d 530 (1988), and we will not consider the issues raised by appellant for the first time on appeal, *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

Therefore, we consider only whether the trial court erred in finding that counsel was not

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<sup>1</sup>In his reply brief, appellant implies that he was prohibited by procedural rules from obtaining a ruling on issues omitted from the trial court's order. Criminal Procedure Rule 37.2(d) prohibits consideration of a petition for rehearing after a trial court has ruled on a Rule 37.1 petition. However, a petitioner under Rule 37.1 is entitled to request that the court modify its order to include a ruling on an issue that was not addressed in the court's order. *Rutledge v. State*, 361 Ark. 229, 205 S.W.3d 773 (2005) (per curiam). Such a request does not constitute a request for rehearing that is prohibited by Rule 37.2(d). *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000) (citing *Matthews v. State*, 333 Ark. 701, 970 S.W.2d 289 (1998) (per curiam)). It is the appellant's obligation to obtain a ruling on any omitted issues in order to preserve those issues for appeal, and the filing of a motion to consider an omitted issue allows an appellant a means to have all issues addressed by the court. *Beshears, supra*.

ineffective in failing to object to the prosecutor's use of the word "cancer" during closing arguments. The transcript revealed that in the initial closing, the prosecutor argued that "the use of drugs, particular methamphetamine, is a cancer on our society . . . [and] this particular blight, this particular part of the cancer, there is a cure for that and that cure is to go back and find him guilty of all three charges."

In its order denying the Rule 37.1 petition, the trial court held that it would not have sustained an objection to the word "cancer" had an objection been made by counsel. It also held that it would not have found "cancer" to be sufficiently inflammatory to address sua sponte. The trial court's order listed three specific bases utilized in reaching its decision: the statement was at the end of the prosecutor's closing argument; it was not repetitive; it did not directly refer to appellant as a "cancer." Also, the jury was instructed that closing arguments are not evidence.

Appellant contends on appeal that the trial court's reasoning was not supported by the record. He argues that he was in fact called a cancer and that the prosecutor alluded to a "cancer and cure" argument throughout the closing.

Trial courts are given broad discretion to control counsel in closing arguments, and this court will not interfere with that discretion absent a manifest abuse of discretion. *Tyron v. State*, 371 Ark. 25, \_\_\_ S.W.3d \_\_\_ (2007). A reversal based upon improper closing remarks is rare, and trial courts are in the best position to evaluate whether a prosecutor's remarks are potentially prejudicial. *Id.*

In this matter, no abuse of discretion was demonstrated by appellant as the record supports the trial court's ruling. The transcript shows that the prosecutor did not directly refer to appellant as a cancer. The transcript also supports the trial court's reasoning that the prosecutor limited the use of the word cancer to the very end of the initial closing argument. In addition, the prosecutor did

not use the word or allude to a “cancer and cure” argument in the rebuttal closing as maintained by appellant.

Appellant fails to establish factual support for the contention that the trial court’s ruling was incorrect or that counsel’s performance was deficient under *Strickland*. He also fails to show that he was prejudiced by trial counsel’s actions or to provide facts that support his claim of prejudice. *Nelson, supra*. Further, he did not demonstrate that decision reached by the jury would have been different had counsel objected to the prosecutor’s closing arguments. *Greene, supra*. On this point, the trial court did not err in its findings.

Appellant next asserts in the second sub-point that the trial court erred in finding that trial counsel was not ineffective for advising appellant to provide information to the jury that was not in the record. The record indicates that during the sentencing phase of the trial, the jury was informed that appellant was being sentenced as a habitual offender. While deliberating, the jury requested to be provided the number of years that appellant had actually served as a result of his prior convictions. The trial court gave appellant different options for a response, including informing the jury that the “pen pack” did not include that information and it would not be provided to them. After consultation, counsel stated that appellant was agreeable to providing the response, “Eight and one half years in prison and 22 months on parole.” The trial court verified with appellant that he wished to provide the jurors with the answer.

On appeal, appellant maintains that during their private conversation about the jury’s query, trial counsel informed appellant that “the jury already had this information or would find it out anyway and there was no reason to withhold it at this point” and that disclosure “would not be harmful to his case[.]” Appellant alleges that the advice given by counsel was incorrect and resulted

in evidence being placed before the jury that was not previously in the record.

As to counsel's actions, the information provided to the jury was not prohibited under Arkansas Code Annotated § 16-97-103 (Supp. 2003).<sup>2</sup> Thus, no confidential or improper information was disclosed to the jurors. Appellant also speculates that this response informed the jury that appellant had committed these offenses while on parole. However, the response did not include the dates related to incarceration or parole. Appellant's argument that the jury reached that conclusion based on the additional information provided is mere conjecture. Appellant did not show that the advice presumably given by counsel was deficient under *Strickland*.

Appellant complains that he received the maximum sentence for all charges as a direct result of counsel's advice and argues that the sentences themselves establish that appellant was prejudiced. However, appellant received less than the maximum sentence on the most serious charge, possession of methamphetamine, a Class Y felony. The sentencing range for a Class Y felony is ten to sixty years' or life imprisonment. Appellant received a sentence of 60 years' imprisonment on this charge rather than life imprisonment.

Further, appellant's argument fails to consider other evidence presented to the jury that may have accounted for the sentences he received, including the large amount of methamphetamine in his possession at the time of his arrest, fleeing from the arresting deputy during the deputy's investigation and appellant's prior drug-related criminal convictions. Finally, the jury recommended that the sentences be served concurrently rather than consecutively, whereas the trial court imposed consecutive sentences. The sentences imposed by the jury, standing alone, do not factually support

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<sup>2</sup>This statute provides that the "jury may be advised as to the nature of the previous convictions, the date and place thereof, the sentence received, and the date of release from confinement or supervision from all prior offenses[.]" Section 16-97-103(2).

appellant's claim of prejudice. Apart from pointing to the sentences, appellant provides no facts to support this claim of prejudice and relies solely upon conclusory arguments. *Nelson, supra; Jackson, supra.* He fails to demonstrate that decision reached by the jury would have been different if this information had not been presented. *Greene, supra.* The trial court did not err in denying appellant's petition on this point.

In appellant's third sub-point for ineffectiveness, he contends that the trial court erred in finding that trial counsel was not ineffective for failing to ensure that appellant was physically present during "his sentencing hearing." He also claims that appellate counsel failed to raise this issue in the direct appeal.

The record reveals that at the conclusion of the sentencing phase of the jury trial, the court pronounced appellant's sentences in conformity with the jury's recommendation including the provision that the sentences were to be served concurrently. The trial court did not enter the judgment at that time.

A week after the jury trial, the court spoke to counsel on the record in the presence of the prosecutor. The court informed counsel that it would be entering a judgment in which the sentences would run consecutively rather than concurrently. The trial court noted that it had always intended to sentence appellant to consecutive sentences, but had inadvertently used the incorrect term from the bench at the close of the jury trial. In this conversation with trial counsel, the court set out the reasons it considered in support of consecutive sentences.<sup>3</sup> At the end of the meeting, the court noted

<sup>3</sup>The trial court cited: (1) the "tremendous amount" of methamphetamine in appellant's possession; (2) his attempt to flee from the deputy; (3) his lack of remorse; (4) the lack of mitigating factors presented in sentencing; (5) appellant's four previous felony convictions involving serious illegal drug violations; (6) his original forty-year sentence was commuted to a shorter term by the Governor and appellant committed the present crimes within eighteen months after his early release.

that it wanted to inform counsel so that the judgment would not “come as [a] surprise” to counsel and appellant.

We first note that appellant contends on appeal that the court below did not make a ruling on the correct issue of whether appellant “had a constitutional right to be present at this critical stage of the proceedings against him.” However, the trial court did address this issue by ruling that appellant’s presence was not required at the meeting.

Appellant concludes that the in-court meeting between the trial court, counsel and the prosecutor was tantamount to a sentencing hearing and constituted a critical stage of the proceeding against him. He contends that the criminal case was “recalled” by the trial court and that the court modified, changed and pronounced appellant’s sentence at the meeting. He also argues that counsel should have objected to the proceeding’s being held without appellant’s attendance.

Appellant provides no factual basis for these assertions. The trial court stated specifically at the meeting that it had always been its intent to have the sentences run consecutively. The judgment and commitment order had not been entered when the meeting occurred so the judgment entered merely reflected the correct sentence as it was meant to be from the outset. On direct appeal, the court of appeals ruled that the trial court was within its rights to impose the sentences to be served consecutively. Appellant also failed to establish that the trial court was prohibited from considering any of these factors relied upon by the court in determining whether the sentences should run concurrently or consecutively.

Moreover, the transcript of the meeting does not indicate that the trial court recalled the case or modified, changed or pronounced appellant’s sentence at that time. Even though the discussion of the consecutive sentences was conducted on the record, the record on appeal does not contain a

notice of a sentencing hearing or advance notice of a hearing of any type related to the meeting. Appellant did not demonstrate that the proceeding was more than a correction by the court to reflect the court's original intention to use the word "consecutively" rather than "concurrently."

Appellant fails here to demonstrate that he was required to be physically present during the meeting, and counsel was not deficient for failing to make an argument at trial or on appeal that had no merit. *Noel, supra*. Also, while appellant contends that what occurred was an in-court modification to the judgment that amounted to a critical stage of the trial and required appellant's presence at the meeting, he cites no authority for this conclusion. We will not consider a point raised on appeal where the appellant fails to cite authority. *See Gwin v. Daniels*, 357 Ark. 623, 184 S.W.3d 28 (2004). The trial court did not err in denying appellant's Rule 37.1 petition on this point.

We turn last to appellant's fourth sub-point alleging ineffective assistance of counsel. At the end of the pretrial suppression hearing, counsel informed the court that Ms. Nicky Robinson was supposed to testify on behalf of appellant, but she could not be located in the courthouse. In this claim, appellant alleges that counsel failed to subpoena Ms. Robinson for the suppression hearing held on the morning of the jury trial, which was tantamount to failing to call her as a witness. He also contends that counsel failed to obtain a continuance so that Ms. Robinson would have been present to testify at the jury trial.

Evidence adduced at the pretrial suppression hearing showed that the charges against appellant arose after Deputy David Roberts began a welfare check on appellant. At that time, appellant's truck was parked at night on the side of a highway while he was on a cell phone call to Ms. Robinson. At the suppression hearing, Deputy Roberts explained that during the course of the welfare check, he believed that appellant was using drugs. After checking with dispatch about

outstanding warrants, prior convictions and other information, Deputy Roberts first asked appellant to exit the truck and then asked appellant to empty his pockets. Appellant claimed at the suppression hearing that he objected to the deputy's instructions because he was not under arrest, but complied only because the deputy unsnapped his gun holster. Deputy Roberts testified that appellant voluntarily complied with his requests and that appellant was not in custody at that time.

After exiting the truck and emptying the contents of his pants pockets, the deputy noticed a white straw and some white powder that had been in appellant's pocket. The deputy directed appellant to place his hands on the vehicle, but appellant ran from the deputy. Appellant was placed under arrest after he was apprehended, and several bags were found on appellant and in his truck containing methamphetamine, pseudoephedrine and a cutting agent used with methamphetamine. Digital scales and other drug-related paraphernalia were also seized.

In this appeal, appellant argues that Ms. Robinson's testimony was essential to the suppression hearing as she remained on the cell phone and was able to hear everything that occurred between appellant and Deputy Roberts. According to appellant, her testimony would verify appellant's version of the incident and support his contention that Deputy Roberts had conducted an illegal search by placing appellant in custody with no probable cause. In his claim of ineffective assistance of counsel, appellant contends that the suppression hearing turned almost exclusively on the testimony of Deputy Roberts. Further, without Ms. Robinson's testimony, the trial court would have "simply weighed the credibility" of Deputy Roberts' testimony against the testimony of appellant. As a result, appellant's credibility would not have been bolstered or the deputy's been diminished.

The objective in reviewing an assertion of ineffective assistance of counsel concerning the

failure to call certain witnesses is to determine whether this failure resulted in actual prejudice which denied the petitioner a fair trial. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987) (per curiam). An attorney's decision not to call a particular witness is largely a matter of professional judgment. *Strickland, supra; Wiggins v. Smith*, 539 U.S. 510 (2003). Even the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not, in itself, proof of counsel's ineffectiveness. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001).

Had Ms. Robinson testified as set forth by appellant in the Rule 37.1 petition, her testimony would have been the same as appellant's testimony at the pretrial suppression hearing, thereby corroborating his version of events. The trial court heard appellant's testimony and was able to weigh it along with the other testimony at the hearing, including Deputy Roberts' recollection of events. Conflicts in testimony are for the trial judge to resolve. *Harper v. State*, 359 Ark. 142, 194 S.W.3d 730 (2004). The trial court here was not required to believe the testimony of any witness, particularly that of appellant since he was the person most interested in the outcome of the proceedings. *Id.* While the trial court would not have been required to believe Ms. Robinson's testimony, in its order denying the Rule 37.1 petition, the court held that her testimony would have shown only minor inconsistencies between the testimony of appellant and Deputy Roberts. Further, the court determined that these inconsistencies would have been insufficient to require the suppression of evidence sought by appellant. Counsel was not deficient for failing to issue a subpoena for Ms. Robinson's presence at the suppression hearing as appellant failed to show that actual prejudice resulted from his actions. *Hill, supra.*

Likewise, counsel was not deficient for failing to seek a continuance of the jury trial so that Ms. Robinson could be called as a witness. The trial court held in the Rule 37.1 order that her

testimony as set out in the petition would not have justified granting a continuance and no actual prejudice could be shown. *Id.* Appellant's conclusory statements on appeal as to the alleged prejudice suffered by appellant are unsupported by facts and cannot be the basis for a claim under Rule 37.1. *Nelson, supra; Jackson, supra.* The trial court did not err in finding that trial counsel was not ineffective on this point.

Finally, in this sub-point, appellant makes a number of new arguments related to this issue. However, as these arguments are outside the scope of the issues raised in the original Rule 37.1 petition, they will not be considered here. *Morgan, supra; Ayers, supra.*

Affirmed.

Glaze, J., not participating.